IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.361 OF 2005

Adil alias Ardeshir Jahangir Patel
Age 60 years, Occ: Service
R/at: 167, , ,M.G.Road Jhala Apartment
Pune 411 001. ...Appellant

Vs.

Smt. Yasmin Adil alias Ardeshir Patel
Age 53 years, Occ: Household,
R/at: C/of Mr. A.E. Kapadia, 2 Meet Garden
Opp: Nagarwala School, Yellow Gate
Kalyani Nagar, Pune -411 006. ...Respondent

Mr. R.N. Sanghavi for Appellant
Mr. Sachin Pande for Respondent

CORAM: H.L.GOKHALE &
ROSHAN DALVI, JJ.
JUDGMENT RESERVED ON : 27TH SEPTEMBER 2005
JUDGMENT DECLARED ON : 30TH NOVEMBER 2005

JUDGMENT (PER ROSHAN DALVI, J.)

1. This Appeal challenges the order and judgment of the learned VI Joint Civil Judge (S.D.) Pune dated 30th July 2004.

2. The Respondent is the wife of the Appellant. She filed the suit for recovery of possession of the suit premises being the premises on the 4th floor (part) admeasuring 392.60 sq. ft., the entire 5th floor

admeasuring 848.61 sq. ft. and the terrace admeasuring 507.67 sq. ft. situated in B.K. Jhala Chambers Building at CTS No.167, M.G.Road Pune. She has also sued for declaration of her ownership thereto. She applied for injunction restraining her husband, the Appellant herein, from creating 3rd party rights therein. She also sued for damages and prayed for costs.

3. She has been declared to be the owner of the suit premises. She has been ordered to be handed over the possession of the suit premises also. An injunction against the Defendant (Appellant herein) has also been granted restraining him from creating 3rd party rights in the suit property. The Defendant has been directed to pay the costs of the Plaintiff and bear his own. The claim for damages is not granted.

4. The suit premises came to be constructed by one Jhala Builders after demolition of the earlier premises in which initially the Appellant's aunt was the tenant of the erstwhile landlady one Mariambai. The Appellant lived with the said aunt prior to his marriage.

5. The said landlady executed an agreement for sale in favour of the Appellant and the Respondent on 25th May, 1969 Exhibit-37 in evidence, upon payment of an earnest amount of Rs.5,000/- , admittedly paid by

the father of the Respondent by a Demand Draft No.41/1409.

6. The landlady executed a sale deed also in favour of the Appellant and the Respondent on 19th July 1969 , Exhibit-36 in evidence, after receiving the balance consideration of Rs.26,000/- on 2nd July, 1969 by a Demand Draft No.358356 stated to have been paid by the Respondent's father to her.

7. The Appellant and the Respondent were not married then though it was decided that they were to marry each other in a few days. They got married on 20th October 1969 after the execution of the sale deed.

8. In 1978-79 the Appellant and the Respondent developed their property at CTS No.167, MG road, Pune through one Jhala Builders. They entered into an agreement with the said builder on 19th June 1979 marked Exhibit-39 in evidence for development of their property.

9. Thereafter they entered into another agreement with the said Builder on 5th March 1981 for development of their property marked Exhibit-38 in evidence.

10. Upon the development of the property the

Appellant and the Respondent were given part of the 4th floor, the entire 5th floor and the terrace of the building by the said Jhala Builders. They lived in the said developed and newly constructed premises since June 1979.

11. It is the Appellant's case that thereafter the Respondent left the matrimonial home and started residing with her parents. The Appellant has been residing in the said premises continuously until the Respondent filed the Civil Suit for recovery of the possession and declaration of her ownership.

12. The Appellant claims to be in possession and also claims ownership of the suit premises. It is seen that the Appellant has not produced absolutely any evidence to substantiate his claim of ownership. His claim to possession of the suit premises follows upon his claim to ownership. The learned Civil Judge has considered the aforesaid documentary evidence produced by the Respondent in support of her oral evidence showing the consideration paid by her from her Bank Account prior to her marriage for the property in which she resided with the Appellant after their marriage.

13. It is the case of the Appellant that he paid consideration for the purchase of the said premises,

but got the documents executed in the joint names of both the parties. It is the case of the Respondent that she, or her father on her behalf, alone paid the entire consideration but the documents were executed in the joint names of both the parties.

14. Both the parties examined themselves. The Respondent also examined her mother.

15. The Appellant has sought to show in the oral evidence that he had the means to purchase the property under the sale deed with his aunt's landlady. His evidence shows that he was serving as Company Secretary and was employed initially in SKF Ball Bearing Company and later in Mahindra & Mahindra Ltd. And other Companies.

16. In the oral evidence the case put by the Appellant to the Respondent's mother, who has been examined as P.W.2, is that there was cash paid in respect of the transaction of purchase. The mother has affirmed that aspect and volunteered to state that “it was paid by us”. The Appellant has however not put any case to the Respondent or her mother that he had paid the said cash or a part thereof. In his oral evidence the Appellant agrees that the total consideration amount which was payable for the purchase of the property from the landlady was Rs.31000/-. There is no

evidence to show that any further amount was payable or paid. The Appellant's evidence does not show any specific payment made by him. The learned Judge has correctly assessed the oral evidence.

17. The Respondent has relied upon intrinsic evidence to show that the flat was purchased in the names of the Appellant and the Respondent but the consideration was paid only by the Respondent or her father on her behalf and that it was purchased so that the Appellant and the Respondent could make it their matrimonial home.

18. Such intrinsic evidence is contained in:

(i) Two admitted letters of the aunt of the Appellant with whom the Appellant resided as a bachelor and who was the initial tenant of the erstwhile land lady in respect of the premises then tenanted to her (marked Exhibits 50 and 51 in evidence). The letters are dated 4th June 1958 and 25th July 1958 written by the Respondent's aunt to the parents of the Respondent.

The letters show her considerations and wishes regarding the marriage and the married life of the Appellant and the Respondent. The Respondent has relied upon these letters to show

certain references to the lease of the premises. She has contended that they reflect the expectations of the aunt to get the tenanted premises purchased by her father.

(ii) The admitted letter dated 3rd July 1968 of the Appellant addressed to the Respondent's parents marked Exhibit-52 in evidence.

This letter makes a specific reference to the landlady who was to execute the sale deed. It interalia shows the anxiety of the Appellant in getting the sale deed executed and to that end in convincing the landlady that the sale proceeds could be invested in reliable securities by her for her old age. It also makes a reference to an uncle who was to help the Appellant in obtaining the sale deed from the landlady. It shows that the Appellant was to go to the residence of the Respondent's parents after receiving a reply from the landlady. The Respondent has relied upon that letter to show that the Appellant had corresponded with her parents in respect of the sale deed only because her father was to pay the consideration thereof.

(iii) The xerox copy of the pass book of the Respondent in Amalner Co-operative Urban Bank Ltd. at Amalner, Dist: Jalgaon for savings Bank

Account No.315/13 opened on 27th March 1969 with a cash deposit of Rs.201/- marked Exhibit-53 in evidence.

The said account shows a debit entry of Rs.26000/- for the withdrawal affected by the Respondent herein on 2nd June 1969 (wrongly stated as 2nd July 1969). It is this amount which is the consideration paid by a Demand Draft to the landlady. This is the actual evidence of payment of the consideration.

(iv). The Agreement of Sale Exhibit 37 in evidence.

It is signed only by the landlady as the Vendor. Both the Appellant and the Respondent are shown as purchasers, the Respondent being Purchaser No.1.

(v) The sale deed, Exhibit-36 in evidence, dated 19th July 1969 is between the landlady, as the Vendor and the Respondent shown as Purchaser No.1 and the Appellant shown as Purchaser No.2. The execution clause of it shows it having been executed only by the landlady Mariyambai as the Vendor and the Appellant as the purchaser. The name of the Respondent who is shown as Purchaser No.1 in the execution clause of the type-written sale deed has been canceled.

The oral evidence of the parties shows that she was not present in Mumbai on that day. The Respondent was Ms. Yasmin Kapadia at the relevant time. The execution of the sale deed has been witnessed interalia by one N.E.Kapadia, a relative of the Respondent. The Respondent accordingly contends that this evidence goes to show that it was not the Appellant who paid the consideration but the Respondent, for the property sold to them and which was to be their matrimonial home.

(vi) The Agreements with Jhala Builders dated 19th June 1979 and 8th March 1981 are for development of their property.

These agreements have been signed by both the parties as Vendors, the Appellant being Vendor No.1. The Agreement dated 19th June 1979 has been witnessed by the Respondent's mother (examined in the trial as P.W.2)

19. The Appellant has not shown any consideration for the suit premises paid by him. He has also not denied the earnest deposit paid by the Respondent's father. He admits that both were in joint possession and claims that both were joint owners. The Respondent, as the Plaintiff in the Civil Suit, claims to be an exclusive owner, which

fact she has shown by her entry in the pass book, a day before the consideration was given to the landlady and the sale deed was executed, showing both the Appellant and Respondent as the purchasers, though it was only signed by the Appellant then.

20. The only point for consideration in the appeal is whether the Appellant also can be taken to be a joint owner. That would be only upon the Appellant showing a part of the consideration paid by him. He has shown none. The learned Civil Judge has therefore, correctly considered the evidence, oral and documentary, before him and passed the Judgment in favour of the Respondent declaring her to be the owner, granting her possession and restraining creation of 3rd party rights by the Appellant.

21. It is contended that the Respondent's claim would be barred under the Benami Transactions (Prohibition) Act, 1988 since the suit is filed after the enactment of the Act. Under Section 2(a) of the Act, a Benami transaction is defined as a transaction in which the property is transferred to one person for a consideration paid or provided by another person. It is seen that in this case, the consideration is certainly paid and provided by the Respondent. The property is transferred also in the name of the Appellant. The Appellant, therefore, holds the property benami for the Respondent. Our attention has been drawn to Section 3 of the Act which prohibits the right to recovery

of the property held benami. It is contended that the transaction of purchase of property was benami and hence fell within the mischief of Section 4 of the Act. Section 4 reads thus :-

4. **Prohibition of the right to recover property held benami-** (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to the real owner of such property.

(3) Nothing in this section shall apply, -

(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family ; or

(b) Where the person in whose name the property is held is a trustee or other person

standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

22. The suit property is held by the Appellant as the person standing in fiduciary capacity with the Respondent, he being her husband. Consequently, the prohibition under Section 4 does not apply to the Respondent. The Respondent can, therefore, sue to recover possession of the suit property under Section 5 of the Specific Relief Act upon showing her ownership rights therein, as she has done.

23. In the case of **S. Sankara Hali & Sankara Institute of Philosophy and Culture Vs. Kishori Lal Goenka, (1996) 7 SCC 55,** a transaction between the ostensible and real owner is held not voided by Section 3 of the Act. In this case, both are shown to be purchasers though the initial sale deed is signed only by the Appellant. Upon the Respondent showing how the consideration was paid from her bank account, she is entitled to recovery of the property owned by her under the General Law being the Specific Relief Act.

24. It may be mentioned that the act was enacted mainly to deal with the malaise of debtors avoiding legitimate claims of third parties under an ostensible

purchase by a party who is otherwise not the real owner upon payment of consideration for such purchase. Hence, in the case of **Duvuru Jaya Mohane Reddy Vs. Alluru Nagi Reddy, 1994 Supp (2) SCC 559 = AIR 1994 SC 1647,** a benami transaction between a Judgment Debtor and his wife was held void under Section 4 of the Act. The execution under Order XXI Rule 58 was, therefore, directed to proceed. No prohibition under Section 4 can apply to this case.

25. It is brought on record by the parties that after the Respondent left her matrimonial home, the Appellant continued in possession of the suit premises which was their matrimonial home and has even sought to create certain 3rd party rights in the suit premises. The Appellant claims to have given the suit premises to paying-guests and licensee.

26. It is the case of the Appellant in the appeal that he keeps indifferent health and that he desires to continue to live in the suit premises, which is his matrimonial home, for the rest of his days. That concession is only to be granted as an indulgence for his stay in a portion thereof as his matrimonial home, as the Appellant has not shown any legal right in the suit premises as a joint owner thereof.

27. Upon considering the evidence led by the parties before

the learned VI Joint Civil Judge (S.D.) Pune, which has been considered by the learned Judge correctly, the Appeal fails. Hence, the following order.

ORDER

1. The Appeal is dismissed. However, there shall be no order as to costs of the Appeal.

2. The Appellant shall hand over possession of the 5th floor admeasuring 848.61 sq. ft. built up area as well as the terrace admeasuring 507.67 sq. ft. built up area to the Respondent herein forthwith. Upon the consideration that he was the husband of the Respondent and has continued in possession of the premises as his matrimonial home since its construction as permitted by the Respondent, the Appellant is allowed to remain in possession only in the 4th floor premises during his life time without any other rights whatsoever. He will not induct any third party or part possession thereto or create any third party rights therein. This indulgence is given to the Appellant only upon the Appellant himself handing over vacant possession of the 5th floor and the terrace premises to the Respondent after vacating his paying-guests/licensees, if any, therein. The Respondent shall be entitled to take possession of the suit premises on the 4th floor of

the aforesaid building on the demise of the Appellant.

(H.L. GOKHALE, J.)

(ROSHAN DALVI, J.)